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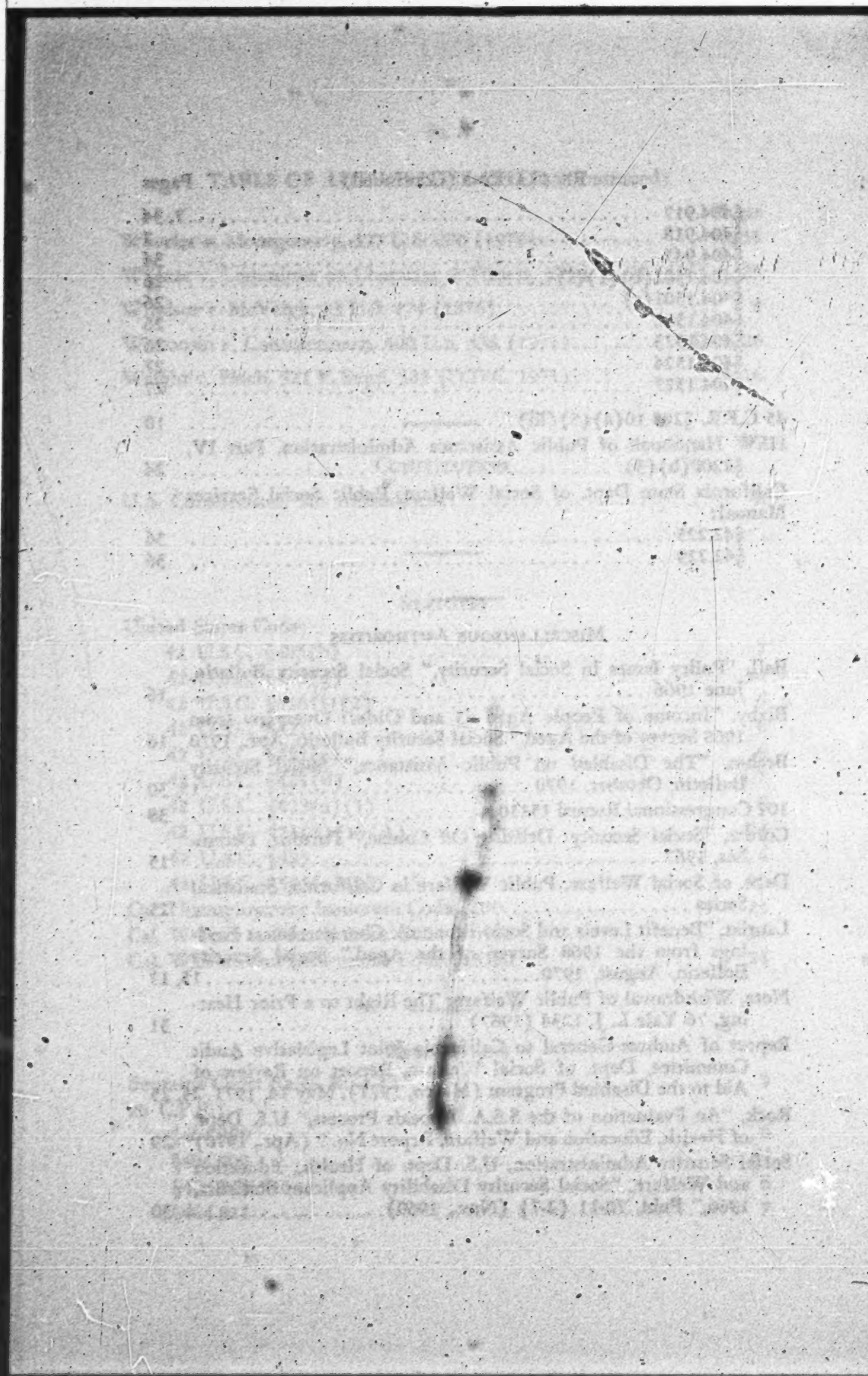

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# In the Supreme Court of the United States

October Term, 1971

**No. 161**

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
*Appellant,*
vs.
RADIE WRIGHT, et al.,
*Appellees.*

**No. 5211**

RADIE P. WRIGHT, et al.,
*Appellants,*
vs.
ELLIOT L. RICHARDSON, Individually and in his Capacity as Secretary of Health, Education and Welfare,
*Appellee.*

On Appeal from the United States District Court for the District of Columbia

## Brief for the Legal Aid Society of Alameda County as Amicus Curiae

### INTEREST OF AMICUS CURIAE, LEGAL AID SOCIETY OF ALAMEDA COUNTY

The Legal Aid Society of Alameda County is a non-profit California corporation established in 1929 for the purpose of furnishing legal services to those

residents of Alameda County who are unable to afford the services of private attorneys. Staff attorneys of the Society have had extensive training and experience in Social Security law. They are currently representing plaintiffs in *Moore* v. *Richardson* (N.D. Cal. Civil No. C-70-2573, filed Dec. 1, 1970), a Social Security disability case awaiting oral argument before a three judge panel in the Northern District of California.

*Moore* v. *Richardson, supra,* is a class action in which plaintiff represents all Social Security disability insurance recipients residing within the geographical area encompassed by the United States District Court for the Northern District of California who have had or may have their benefits terminated without a prior hearing. The defendant is Elliot L. Richardson, Secretary of Health, Education and Welfare, appellant in No. 161 and appellee in No. 5211 herein [hereafter referred to as "the Secretary"]. The plaintiffs in *Moore* have a direct interest in the outcome of this litigation. As in the case *sub judice,* their claim is based on the contention that the statutes authorizing the suspension and termination of Social Security benefits without first affording a recipient a prior hearing are unconstitutional in that they deny the recipient due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

With the consent of both parties, pursuant to Rule 42 of the Supreme Court Rules, the Legal Aid Society of Alameda County respectfully submits its Amicus Curiae brief in support of Radie P. Wright, et al., appellants in No. 5211, and appellees in No. 161.

## SUMMARY OF ARGUMENT

The court below found that the suspension section of the Social Security Act, 42 U.S.C. § 425 was unconstitutional in that it allowed for the suspension of benefits without prior proceedings in which the recipient may participate. But, as the opinion of Judge Mathews, concurring and dissenting in part, made clear, the majority did not extend to the recipient "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally," as this Court has required for welfare suspensions and terminations in *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970). *Wright* v. *Finch*, 321 F. Supp. 383, 388 (D.D.C., 1971). Amicus contends that procedural due process can only be satisfied by a prior hearing complying with the standards of *Goldberg*, *supra*.

In a series of recent cases involving procedural due process, this Court has continually stated that except in the most extraordinary situations, a meaningful opportunity to be heard must be provided *before* a person may be deprived of a significant prop-

erty interest. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971).

Social Security recipients are subjected to serious and often irreparable harm when their benefits are cut off. A large number of them stand in a similar economic position to the recipients of public assistance before the Court in *Goldberg*, *supra*, and the suspension or termination of their benefits often leaves them without any source of income whatsoever. An opportunity to be heard before their benefits are suspended is essential to protect them from arbitrary government action.

Moreover, the size of the reversal rate in Social Security disability cases—44.2%—a much greater figure than the rate of reversals found by the lower court[1] to be a "startling statistic" in *Goldberg*, bears striking witness to the great need of recipients for a prior hearing. The complex factual nature of Social Security determinations makes a prior hearing indispensable to the accurate resolution of disputed cases. Social Security disability cases present virtually the same issues as Welfare Aid for the Totally Disabled terminations for which prior hearings are currently being held as a result of the *Goldberg* ruling.

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[1] See *Kelly* v. *Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

The Secretary's interest is fully consistent with the provision of a prior hearing. Social Security is an earned right, the deprivation of which without a prior hearing would tend to cause "the societal malaise . . . [and] widespread sense of unjustified frustration and insecurity," which the Court attempted to guard against in *Goldberg, supra*, 397 U.S. at 265. Moreover, since not all Social Security recipients are likely to be judgment proof and beyond the reach of the Secretary in the event of an overpayment, the administrative inconvenience and expense caused by Social Security prior hearings should be less burdensome than was the case with respect to welfare. Certainly, no "extraordinary situation"[3] justifying summary procedures is present in this case. Thus, on balance it is urged that a prior hearing is constitutionally mandated for Social Security recipients.

## ARGUMENT

### THE SECRETARY'S PROCEDURES IN SUSPENDING AND TERMINATING SOCIAL SECURITY BENEFITS WITHOUT A PRIOR HEARING DENIES SOCIAL SECURITY RECIPIENTS DUE PROCESS OF LAW.

#### I. The Secretary's Existing Procedure Does Not Afford the Recipient a Prior Hearing.

The statutory scheme pursuant to which social security disability benefits are generally suspended

[3] *Sniadach* v. *Family Finance Corp.*, supra. 395 U.S. at 339.

and terminated is as follows: 42 U.S.C. §416(i)(2) defines a "period of disability" and states that it shall end on "the second month following the month in which the disability ceases."[3] Determinations concerning disability are made by the Secretary in cooperation with the governments of each of the States and the District of Columbia, 42 U.S.C. §421. Under 42 U.S.C. §425 the Secretary is authorized to make *ex parte* decisions that a recipient's disability may have ceased and is further empowered to suspend his benefits. A decision to suspend is not considered an "initial determination", and this decision cannot be formally reconsidered or appealed. The Secretary then notifies the state agency charged with making disability determinations under 42 U.S.C. §421(a) which in turn determines whether the disability has ceased and if so, the date on which cessation occurred. This determination is regarded as the determination of the Secretary, and is an "initial determination" as defined in 20 CFR §404.905, and thus, may be formally reconsidered. Notice of the determination is mailed to the recipient who may request that it be reconsidered in accordance with 20 CFR §404.910-404.916. A reconsideration is an *ex parte* review by the state agency and the Social Security Administration in which the recipient may make only written submissions. The request for reconsideration must

[3] A period of disability also ends "on the month preceding the month in which the individual attains age 65." 42 U.S.C. § 416(i)(2). See also 42 U.S.C. § 423(a)(1) regarding entitlement to disability benefits.

ordinarily be made within six (6) months of the date of the mailing of the initial determination, 20 CFR §404.911; but, the Secretary has no time limit in reaching his decision. Notice of the reconsidered determination is subsequently mailed to the recipient.

Only after this process is completed may a recipient file a request for a hearing, 20 CFR §404.917. This request must be made within six (6) months of the notice of the reconsidered determination, 20 CFR §404.918; however, the Secretary's regulations do not require any time within which the hearing must be held or decided. The right to a hearing is provided for in 42 U.S.C. §421(d) and 42 U.S.C. §405(b). No right to a *prior* hearing is provided for by the statutes or regulations.

## II. Only a Prior Hearing Satisfies the Requirements of Procedural Due Process.

It has long been recognized that the most basic and fundamental elements of due process in our law are notice of proceedings and an opportunity to be heard on the merits of a claim *before* one is subjected to official sanctions which effect a taking of property, liberty or life. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941); *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *Southern Railway Co.* v. *Virginia*, 290 U.S. 190, 196 (1933); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915); *Security Trust Company* v. *Lexington*,

208 U.S. 323 (1906); *Hovey* v. *Elliot*, 167 U.S. 409 (1897); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876).

It is also beyond dispute that procedural due process is applicable to the Secretary's actions in suspending or terminating Social Security benefits. This Court has specifically held that the "interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960). Social Security benefits just like welfare benefits are "a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights". *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970). Indeed the insurance benefits provided by Social Security are more of an "entitlement" than welfare benefits since these benefits are "earned" as the result of contributions made by the recipient out of his wages when he was fortunate enough to be able to work.

The Secretary does not contend that due process does not apply to the suspension or termination of Social Security benefits. But he does urge that due process is satisfied by an elaborate and time consuming procedure that provides the recipient with a meaningful opportunity to be heard only *months* after his benefits have been suspended or terminated pur-

suant to an "initial determination". Due process undeniably requires that an opportunity to be heard must be provided at a "meaningful time". *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Thus, the major issue in this case is when notice and a hearing comporting with due process must be given.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) this Court held that the Wisconsin statutes permitting pre-judgment wage garnishments without notice and an opportunity to be heard on the merits violated procedural due process. The Court found that wages were "a specialized type of property" and that the pre-judgment garnishment of wages "may as a practical matter drive a wage-earning family to the wall". *Sniadach, supra*, at 340-342.

The situation of the Social Security recipient who has had his benefits suspended or terminated is even more compelling than that of the wage earner in *Sniadach*. In *Sniadach* the wage earner was only deprived of a portion of his wages; in no event could more than 50% of his earnings be garnished under Wisconsin law. *Sniadach, supra*, at 338 n.1. In comparison, the terminated Social Security recipient is deprived of his entire benefit check, which may well have been his sole source of income, and thus, is likely to be in even greater financial danger of being "driven . . . to the wall". *Sniadach, supra*, at 342.

Further, like the wages garnished in *Sniadach*, Social Security benefits also represent a "specialized type of property" since they are insurance benefits earned by a worker while employed and paid as a replacement for wages. Thus, as in the case of pre-judgment garnishees, Social Security recipients must also be afforded notice and a hearing before they may be deprived of their property.

Further light has been shed on the issue of when a hearing must be held by the recent decisions of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and the companion case of *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970). The Court held in *Goldberg* and *Wheeler* that procedural due process requires an evidentiary hearing *before* welfare payments may be discontinued or suspended. The decisions therein have been made applicable to all categories of welfare recipients, including those receiving Aid to the Totally Disabled (ATD), and have been further extended to Medicaid recipients and to welfare benefit reductions by regulations promulgated by the litigant Secretary herein. 45 CFR §205.10(a)(5)(iii).

The factors and issues involved in determining whether a person is no longer totally disabled for purposes of ATD are almost precisely the same as those involved in determining that disability has ceased for purposes of Social Security disability benefits, and the recipient parties herein contend that

they are entitled to the same protections that their brethren receiving ATD are allowed. Is it not a strange irony that when a person receives both Aid to the Totally Disabled and Social Security disability benefits his ATD check is protected from summary *ex parte* termination but his earned Social Security benefits are not so protected?

In *Goldberg, supra*, the Court set forth the framework in which it would determine whether a prior hearing was required:

> The extent to which procedural due process must be afforded . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. at 362-363.

It then found that:

> . . . the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

The Court concluded by holding that the "recipient [must] have timely and adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argu-

ments and evidence orally". *Goldberg, supra*, at 267-268. The right to retain an attorney and to be heard by an impartial decision-maker were also guaranteed. *Goldberg, supra*, at 270-271.

In holding that welfare benefits may not be suspended or terminated without a prior hearing, this Court made specific reference to *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), a case which indicates that the holding in *Goldberg* was not intended to be restricted solely to welfare recipients. The Court in *Goldberg* found that:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Thus, the crucial fact in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. 397 U.S. at 264.

*Nash* was concerned not with welfare, but with the plight of unemployment insurance recipients. Unemployment compensation is a program very similar in format, origin and purpose to Social Security disability. Indeed, all three social insurance programs

born in the Social Security Act — social security, welfare, and unemployment compensation — bear striking resemblance to each other. All were aimed at alleviating the plight of needy citizens. Together, they provide their recipients the funds necessary "to obtain essential food, clothing, housing and medical care". Cf. *Goldberg*, *supra*, at 264. Thus, the same procedural safeguards against arbitrary government action that are currently being enjoyed by welfare and unemployment compensation recipients, see *Crow* v. *California Dept. of Human Resources Development*, 325 F. Supp. 1314 (N.D. Cal. 1970), should also be extended to recipients of Social Security disability benefits.[4]

Two other recent cases decided just last term further suggest the right of Social Security recipients to prior hearings: In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), this Court held that a State's failure to provide notice and an opportunity for a hearing to persons whose names were officially posted in liquor stores as "excessive drinkers" and then denied further sales or gifts of liquor, violated due process. Certainly the right to a prior hearing before the suspension or termination of earned Social Security benefits should be granted an equal footing with the rights protected in *Constantineau*.

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[4] Two Circuit Courts have held that the need of public housing tenants necessitates a prior due process hearing before they may be evicted. *Caulder* v. *Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2nd Cir.) *cert. denied*, 400 U.S. 853 (1970).

Then in *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), the Court held that the suspension of a driver's license, which often is a prerequsite for a worker to obtain and hold employment, necessitates a prior hearing. The Court stated: "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and an opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective". (Emphasis in original, footnote and citation omitted) The interests of the government in immediate social security terminations cannot be considered an "emergency", and, as in *Bell*, *supra*, such action must be preceded by a prior hearing.

### III. The Social Security Recipient Is Caused Serious Harm When His Benefits Are Terminated Without a Prior Hearing.

#### A. Social Security disability benefits provide sustaining funds to injured workers.

The Secretary has urged that Social Security recipients should not be afforded the same due process protections that welfare recipients now receive because there is no means test for entitlement to Social Security benefits. Amicus admits that there is no means test for Social Security benefits, but respectfully submits that such a distinction is largely irrelevant: A substantial percentage of persons receiving Social Security benefits are *in fact* poor; moreover, the

due process right to a prior hearing is not reserved only for persons who are *per se* impoverished and destitute, but has regularly been accorded to classes of persons the preponderance of whom are vulnerable to severe economic loss. *Sniadach* v. *Family Finance Corp., supra.*

According to Robert M. Ball, Commissioner of the Social Security Administration: "One objective of the Social Security program has always been to contribute to the prevention of poverty. There is not the slightest question that the Social Security program has been the biggest anti-poverty program in this country." Cordtz, "Social Security: Drifting Off Course", *Fortune*, December, 1967, p. 207.

Information recently compiled by the Social Security Administration's Division of Disability Studies, Office of Research and Statistics, indicates that disability recipients are indeed poor. In 1966, of the 849,000 disability recipients, the median income was only *$2,836*. Brehm, "The Disabled on Public Assistance", Social Security Bulletin, October, 1970, p. 29. Further, "among [such] beneficiaries, 35 per cent were poor and 15 per cent near poor, on the basis of the Social Security Administration poverty and low-income index".[5] Brehm, *supra*, at 30. Moreover, in

[5] "In 1967, the pertinent poverty thresholds were:

| | Poor | Near Poor |
|---|---|---|
| Married Couples | $2,020 | $2,690 |
| Non-married Couples | $1,600 | $1,900 |

Lauriat, "Benefit Levels & Socio-Economic Characteristics: Findings from the 1968 Survey of the Aged", Social Security Bulletin, August, 1970, p. 9.

the Social Security disability insurance program, the beneficiary by definition is unable to work and thus, if terminated, cannot protect himself by working while the validity of his termination is being contested. As the three-judge court stated below, "a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim." *Wright* v. *Finch*, 321 F. Supp. 383, 386 (D.D.C. 1971).

The situation of the person receiving old-age benefits is even more acute than that of the disability recipient. According to Commissioner Ball, "About three-fourths of the aged who get Social Security benefits either are in the poverty group, strictly defined, or would be if it were not for Social Security", and regarding the other one-fourth, "most of [them] have low incomes even though above the poverty level". Ball, *Policy Issues in Social Security*, Social Security Bulletin, June, 1966, p. 5.

Of the aged beneficiaries of Old Age Social Security benefits, "forty-four per cent (44%) [are] classified as poor and eleven per cent (11%) as near poor, on the basis of income threshholds developed by the Social Security Administration."[8] Bixby, "Income of People Aged 65 and Older: Overview from 1968 Survey of the Aged", Social Security Bulletin, April,

[8] See n. 5, *supra*.

1970, p. 8. Statistics recently compiled by the Division of Retirement and Survivor Studies, Office of Research and Statistics indicate that ". . . sizeable proportions of all [aged] beneficiary units had little or no income in 1967 in addition to their [Social Security] benefits—that is, less than $150.00 per person." Lauriat, *supra*, at p. 10, n. 2.

Thus, it is beyond question that most beneficiaries of Social Security benefits have a substantial interest to protect. Just as in welfare, the loss of a monthly Social Security check "may deprive an *eligible* recipient of the very means by which to live while he waits." *Goldberg*, *supra*, at 264.

The Secretary's justification that he should be able to take summary, *ex parte* action because only a portion of the beneficiaries will suffer grievous loss is without merit. This argument wholly ignores *Sniadach* v. *Family Finance Corp.*, *supra*, wherein the Court extended prior hearing protections to wage earners despite the fact that they were not *per se* impoverished or destitute. *See p. 9 supra.*

The rationale of the *Sniadach* case has been applied to a number of other areas where the person being deprived of his property, or the use thereof, was not *per se* poor. This Court has required a hearing prior to the suspension of a driver's license and registration. *Bell* v. *Burson*, 402 U.S. 535 (1971).

The Wisconsin and California Supreme Courts have held that funds deposited in a bank may not be attached without a prior hearing. *Larson* v. *Fetherston*, 172 N.W. 2d. 20 (Wisc. Sup. Ct. 1969), *Randone* v. *Appellate Department*, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971). Similarly, the Minnesota Supreme Court has held that the *Sniadach* rule applied to the pre-judgment garnishment of accounts receivable. *Jones Press* v. *Motor Travel Service, Inc.*, 176 N.W. 2d. 87 (Minn. Sup. Ct. 1970). Several federal district courts have recently held that innkeeper's lien laws were unconstitutional in their failure to provide for a hearing prior to the innkeeper's taking of a lodger's personal property for non-payment of rent. *Klim* v. *Jones*, 315 F. Supp. 109, (N.D. Calif. 1970), *Santiago* v. *McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970). Likewise, in *Blair* v. *Pitchess*, 5 Cal. 3d 258, 96 Cal. Rptr. 42 (1971), the California Supreme Court held that California's replevin law providing that personal property can be taken by a law enforcement officer pursuant to a creditor's instructions without notice or a prior hearing is unconstitutional citing *Goldberg* and *Sniadach*. The same result has also been reached by a three-judge district court in New York. *La Prease* v. *Raymoure Furniture Company*, 315 F. Supp. 716 (S.D. N.Y. 1970) Contra, *Fuentes* v. *Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970) *prob juris noted*, *Fuentes* v. *Shevin*, 401 U.S. 906 (1971); *Epps* v. *Cortese*, 326 F. Supp. 127 (E.D. Pa.) *prob. juris. noted*, 402 U.S. 994 (1971). Two three-judge courts

have held that a procedure which permits a debtor to sign an agreement containing a confession of judgment clause is unconstitutional absent his understanding and voluntary consent citing *Sniadach* and *Goldberg*. *Swarb* v. *Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970) *prob juris noted* 401 U.S. 991 (1971); *Osmond* v. *Spence*, 327 F. Supp. 1349, (D. Del. 1971). Two recent California cases dealing with landlord-tenant laws have further extended the *Sniadach* rationale. In *Mihans* v. *Municipal Court*, 7 Cal. App. 3d. 479, 87 Cal. Rptr. 17 (1970), the court held that a California procedure providing for a landlord's immediate possession of premises in cases of tenant insolvency or inability to respond in damages violated the due process prior hearing requirements of *Sniadach*. In *Gray* v. *Whitmore*, 14 Cal. App. 3d. 784, 92 Cal. Rptr. 505 (1971), the court held that the procedure whereby a landlord may execute on his tenant's personal property to satisfy his money judgment is unconstitutional insofar as it fails to afford the tenant-debtor a hearing on the question of whether the property is exempt from execution under California's exemption statutes.

Further undercutting the Secretary's position are two recent decisions concluding that due process of law requires a hearing to be held prior to the termination of unemployment compensation benefits. In *Java* v. *California Dept. of Human Resources Development*, 317 F. Supp. 875 (N.D. Cal. 1970) *aff'd*

*on statutory grounds*, 402 U.S. 121 (1971), a three-judge court held that *Goldberg* required a hearing prior to the suspension of unemployment insurance benefits as the result of an employer's appeal. Following *Java*, it was further held that a prior hearing was required in an instance where unemployment benefits were terminated because of a recipient's alleged refusal to accept suitable employment without good cause. *Crow* v. *California Dept. of Human Resources Development*, 325 F. Supp. 1314 (N.D. Cal., 1970). The *Java* case has recently been affirmed by this Court on statutory grounds, *Java* v. *California Dept. of Human Resources Development*, 402 U.S. 121 (1971). The unanimous Court recognized that unemployment benefits are a "contractual right not dependent on any means test", and held that 42 U.S.C. 503(a)(1), which provides that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due", meant that pre-termination hearings must be held before benefits may be suspended pending an employer's appeal. In reaching its decision, the Court reviewed the purposes of unemployment insurance and stated:

> Paying compensation to an unemployed worker promptly . . . accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore, that

> the California procedure, which suspends payments for a median period of seven to ten weeks pending appeal, after an initial determination of eligibility has been made, is not "reasonably calculated to insure full payment of unemployment compensation when due." 402 U.S. at 133.

The recipient of Social Security benefits is quite similar to the recipient of unemployment benefits in several respects. Neither is *per se* destitute, but in fact, the majority of the beneficiaries of both programs are poor or near poor. No means test is required for unemployment benefits; they are available to the occasional unemployed millionaire movie star as well as to a pauper. Like Social Security disability recipients, unemployment claimants find themselves unemployed "through no fault of their own", California Unemployment Insurance Code §100.

In *Goldberg, supra*, it may be recalled that the Court cited the case of *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), an unemployment insurance case, as an illustration of the type of interest that can only be adequately protected by a prior hearing. Thus, *Goldberg* indicates that this Court will not require complete destitution before affording recipients of social insurance programs a prior hearing.

In both *Java* and *Crow*, district courts carefully considered the fact that the need of the recipient of

unemployment insurance benefits was not *always* as great as that of welfare recipients and yet, both cases concluded that prior hearings are required on due process grounds. As the court stated in *Crow:*

> Reference is made to plaintiff Crow's financial situation, to the fact that she is married to an employed individual, and to the family's ownership of two (very used) automobiles. Defendants conclude with the argument that since Mrs. Crow does not lack "the very means to live" she is not entitled to the extraordinary remedy of a pre-termination hearing. . . .
>
> Defendants misread *Java*, *Goldberg*, relevant California statutes, and the recent history of American jurisprudence. The right to confront and cross-examine adverse witnesses, where an important decision hinges on a question of fact, is *not* an "extraordinary remedy". It has been found by the Supreme Court to be constitutionally mandated "in almost every setting". *Goldberg* v. *Kelly*, *cit. supra*, at 269. It is *welfare*, not unemployment compensation, or government employment, or garnishment proceedings which was for the longest time deemed outside the protection of the due process clause. The Court invoked the "brutal need" of the walfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which has been employed in previous due process cases, e.g., *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 341-42 (1969), ("pre-judgment garnishment may . . .

> drive a wage-earning family to the wall"), and *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959) ("petitioner's work opportunities have been severely limited. . . ."). It would be anamalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas. 325 F. Supp., at 1317-1318.

The Social Security recipient represented by Amicus in *Moore* v. *Richardson*, *supra*, has neither an employed spouse to support her, nor a car, nor any savings or assets. Having had her earned, Social Security benefits terminated, she has been forced to rely on welfare Aid to the Totally Disabled for survival. As the three-judge district court stated in *Java:*

> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off that her, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly* v. *Wyman*, 294 F. Supp. 893 (1968), and the garnishee in *Sniadach* v. *Family Finance Corp. of Bay View, et al*, 395 U.S. 337 (1969). . . . Defendants urge that

public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. 317 F. Supp. at 878-879.

Moreover, welfare may not be available to the terminated Social Security recipient. In California, it is much more difficult to qualify for Aid to the Totally Disabled than for Social Security Disability benefits. For ATD, a claimant must have a disability which "appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement." To qualify for Social Security, on the other hand, the disability need only "be expected to last for a continuous period of not less than 12 months." Compare Cal. Welfare & Institutions Code, §§ 13501, 13550 with 42 U.S.C. §423 (d)(1)(A). Even if ATD is available, months may pass before eligibility can be established. The State normally has 60 days to determine ATD eligibility. HEW Handbook of Public Assistance Administration, Part IV, §2200(b)(3). However, experience has indicated that at least the full 60 days are usually taken and that frequently a final decision is not reached for several weeks thereafter. As of March, 1971, 69.5% of all applications for ATD in California had been pending for more than 60 days; 22.5% were pending for more than 101 days. Report of Auditor-General to California Joint Legislative Audit Committee, Dept. of Social Welfare, Report on Review of

Aid to the Disabled Program (March, 1971), May 14, 1971, p. 11. In November, 1970, the number of ATD applications on file for more than 60 days totalled 19,890. Dept. of Social Welfare, Public Welfare in California, Statistical Series PA 3-123—PA 3-132.

Interests of far less immediate financial importance or need have traditionally been protected from summary action. For example, in such areas as license suspensions or terminations, due process requirements have regularly been imposed, *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963); *In re Carter*, 192 F. 2d 15 (D.C. Cir. 1951) *cert. denied*, 352 U.S. 862 (1951) and *Homer* v. *Richmond*, 292 F. 2d 719 (D.C. Cir. 1961). Moreover, due process requires a hearing before a student may be expelled from a tax-supported college. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir), *cert. denied* 368 U.S. 930 (1961).

Non-financial rights have also traditionally been protected by procedural due process, including parental rights in custody cases, *May* v. *Anderson*, 345 U.S. 528 (1952), the right not to be summarily deprived of telephone service upon the belief that the telephone is being used for unlawful purposes, *Sokol* v. *Public Utilities Commission*, 65 Cal. 2d 247, 53 Cal. Rptr. 673 (1966), and the right not to be "posted"

as an excessive drinker without a prior opportunity to be heard, *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

The Social Security disability recipients before this Court have all been found initially *eligible* for benefits only after a rigorous initial eligibility determination. Entitlement to disability depends upon an ". . . inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . ." 20 CFR. §404.1501(b)(1)(i). The impairment is one that must result from:

> anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and diagnostic techniques. Statements of the applicant, including his own description of his impairment (symptoms) are, alone, insufficient to establish the presence of a physical or mental impairment. 20 CFR §404.1501(c).

Other factors are also taken into consideration. The Social Security Administration looks at the individual's age, education and work experience. His ability to do other work is also a factor. 20 CFR §404.1502. An initial application for disability payments must submit detailed medical evidence, 20 CFR §404.1523, including a report of a licensed physician, a copy of hospital or other medical records, duly certified, and a description of the individual's capacity to perform significant functions, e.g., ability to walk, sit, and

handle objects. 20 C.F.R. §404.1524. These still may not suffice and the Administration may require any applicant to submit to a physical or mental examination. 20 C.F.R. §404.1527.

Thus, the initial eligibility determination is quite thorough, cf., *California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121, 125-128 (1971), and well-designed to eliminate ineligible applicants. Common notions of fairness and due process would thus require that what is so rigorously won may not be lightly taken away. But that is precisely what occurs under the Secretary's present procedures.

**B. The complex factual nature of Social Security Disability terminations makes a prior hearing indispensable to the accurate resolution of disputed cases.**

The Secretary has argued in his Jurisdictional Statement that prior hearings are less necessary in Social Security disability termination cases than with welfare because the evidence upon which such actions are based is allegedly more objectively ascertainable than is the evidence in welfare cases. Amicus would again point out that recipients of welfare disability benefits (ATD) are presently being accorded prior hearings and that the issues involved in ATD cases are virtually identical to those raised in Social Security disability determinations.

Indeed, the issues involved in a disability termination are the very issues in which confrontation and

cross-examination are most needed. In his brief in *Moore* v. *Richardson*, *supra*, the Secretary admits that "disability determinations require complex judgments of medical and vocational factors by experts in those fields". If so, then shouldn't an opportunity to confront and cross-examine be provided for? If medical facts were indeed as "objectively ascertainable" and as "highly reliable" as the Secretary claims, then our courts and administrative tribunals could be emptied of the numerous attorneys and conflicting doctors who daily disagree about medical facts. Our law libraries could be emptied of texts regarding medical controversy and the cross-examination of doctors. Yet, defendant would decide these issues independently as a ministerial function. We submit that the only fair and accurate way to determine Social Security disability controveries is through an adversary hearing along the lines afforded welfare recipients in the *Goldberg* case.

The facts of the *Moore* case illustrate the need for an adversary hearing. Mrs. Moore's Social Security benefits were terminatd on the belief that her disability had ceased. Yet, one doctor stated that Mrs. Moore was "unable to work at this time". Another doctor disagreed, "I see no reason why this lady could not perform some gainful type of occupation and this would include the necessity to bend and stoop". A third doctor stated that she cannot do "appreciable

bending." Where is the truth? A due process hearing is the only reliable method for finding out.

The rate of reversals of *ex parte* Secretarial determinations starkly reveals the need of recipients for a prior hearing in Social Security disability cases. The reversal rate for all disability hearings for the period of July, 1965 to September, 1969 was *44.2 per cent.* Rock, *An Evaluation of the S.S.A. Appeals Process*, U.S. Dept. of Health, Education and Welfare, Report No. 7, at 4 (April, 1970). The figures for calendar year 1969 are illustrative. Of 9,185 requests for reconsideration of disability cessations, 2,904 were reversed upon reconsideration.[1] There were 1,895 hearings filed during fiscal year 1969 as a result of the Secretary's reconsidered determinations that disability had ceased, and 863 such determinations were reversed as a result of a hearing. Moreover, the Appeals Council reversed 16% of the disability cessation cases that it heard.

With a reversal rate of 44.2%, the interest of the recipient in a prior hearing becomes manifest. The reversal rate on appeal for the terminated welfare recipients in *Goldberg*, *supra*, was considerably lower, 36%. Yet, the lower court in *Goldberg* found this to be a "startling statistic". *Kelly* v. *Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

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[1] These figures were provided to Amicus in the Answers to Interrogatories in *Moore* v. *Richardson*, *supra*.

The Secretary's proven record of administrative error points out the glaring inadequacy of the opportunity currently provided the recipient to submit written evidence and present his arguments orally. Recipients are likely to be uneducated and elderly and thus, need the protection of a meaningful due process hearings before benefits are terminated. In 1966, "59% of the disabled-worker beneficiaries had no more than an eighth grade education, 3% had no formal education", *Brehm, supra*, at 29, and 72% of them were over the age of 50. Social Security Administration, U.S. Dept. of Health, Education and Welfare, *Social Security Disability Applicant Statistics, 1966*, Publ. 70-11 (2-7), Table 2, at 12 (Nov., 1969).

Finally, if prior hearings are mandated, the number of winning appeals filed by recipients would undoubtedly increase.

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the . . . bureaucracy. *Goldberg, supra*, at 264.

Without Social Security benefits, an *eligible*, suspended or terminated recipient may be seriously handicapped in presenting an appeal. Funds are necessary for contacting and preparing witnesses, and perhaps retaining counsel to represent him at the hearing. Faced with the need to provide the necessities of life for himself and his family, the terminated eligible recipient can scarcely devote the time and energy neces-

sary to prosecute his appeal. cf., Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967).

### IV. The Secretary's Interest Is Fully Consonant With Providing a Hearing Prior to the Termination of Social Security Benefits.

Cases upholding summary procedures under the due process clause have been described as "emergency situations," *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), or instances "where harm to the public is threatened." *R. A. Holman & Co.* v. *S.E.C.*, 299 F.2d 127, 131 (D.C. Cir.) *cert. denied* 370 U.S. 911 (1962). As the three-judge district court stated in *Goldberg*, *supra*, "Traditionally, such considerations have been urgent in nature and involve the health, safety, or well-being of many individuals". *Kelly* v. *Wyman*, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).

Examples of situations that call for such summary proceedings include the seizure of allegedly contaminated food, *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908); the seizure of allegedly mislabeled food, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); wartime price and rent regulations, *Bowles* v. *Willingham*, 321 U.S. 503 (1944); and the conservatorship of an insolvent savings and loan association, *Fahey* v. *Mallonee*, 332 U.S. 245 (1947). What these cases have in common is the distinct possibility of immediate and great harm to other citizens.

Obviously, the termination of a recipient's Social Security disability benefits presents no such threat to the health, safety or well-being of the nation. Rather, the only governmental interest urged herein by the Secretary is the same interest raised and rejected by this Court in *Goldberg*, *Java* and most recently *Bell*, namely, the conservation of fiscal and administrative resources.

The protection of the Social Security Trust Fund, which the recipient litigants have contributed to, is a legitimate governmental concern, but it in no way justifies the summary, *ex parte* termination of earned Social Security benefits. As the court stated in *Crow* v. *California Department of Human Resources Development*, *supra*:

> The public purse has been repeatedly invoked in cases prior to this one. This Court will only echo its predecessors: fiscal considerations are always relevant, but are seldom if ever decisive in cases of this sort. 325 F. Supp. at 1317.

The Secretary in his brief in *Moore* v. *Richardson*, *supra*, has assumed for purposes of a cost argument that every recipient whose disability has allegedly ceased, would pursue his right to a prior hearing. The argument has no basis in fact. Every Social Security recipient who finds himself terminated is no more likely to ask for a hearing than is every

welfare recipient whose benefits are terminated. The same argument was raised and rejected in *Goldberg* v. *Kelly, supra.*

Another confusing argument made by the Secretary in *Moore* v. *Richardson, supra,* is his statement that requiring a prior hearing would "create all but insuperable administrative difficulties in the handling of the approximately 950,000 disability determinations made each year." The argument is misleading since the requirement of a prior hearing affects only those recipients already determined *eligible* whose disability has now allegedly ceased and who are being terminated. No change at all will be required in procedures for determining initial eligibilty for benefits.

Identical cost arguments were advanced in the welfare prior hearing cases and rejected by this Court. In *Goldberg* the Court stated that:

> The requirement of a prior hearing, doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recovered since these recipients are likely to be judgment-proof. But, the state is not without weapons to minimize these increased costs. 397 U.S. at 266.

Procedures could be developed by the Secretary to eliminate many of the alleged administrative problems contemplated in his Jurisdictional Statement. The Social Security Act provides for an extensive system

of review of initial agency action including reconsideration by the Secretary (20 CFR §404.909), a fair hearing before a hearing examiner (20 CFR §404.917), review by the Appeals Council (20 CFR §404.945), and eventual review in federal district court (42 U.S.C. §405(g)). The fair hearing now provided, which is the crucial due process step, may be provided as easily prior to suspension of benefits as after. The doctors and other potential witnesses would be just as available for prior hearings as for hearings held months after a termination.

Requiring a hearing prior to the suspension of benefits would also increase the Secretary's efficiency by encouraging him to speed up his presently long and rather cumbersome appellate process. After an "initial determination" that disability has ceased, a recipient has six months to request a reconsideration, and following the reconsideration decision, he has another six months to request a hearing. There are no time limits for administrative decisions and actual practice indicates that the procedure is slow and ponderous. Answers to Interrogatories in *Moore* v. *Richardson*, *supra*, have shown that it takes an average of 99.8 days and a median period of 86 days from the time a request for a reconsideration is filed until a decision is reached thereon. The Secretary's Answers also reveal that the median length of time between the filing of a request for a hearing and the hearing decision is *114 days*.

By speeding up the time it takes to schedule and decide an appeal, any overpayments made pending the appeal will be sharply reduced. As the Court noted in *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970):

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

Unlike welfare, where the Court noted that overpayments "probably cannot be recovered since [the] recipients are likely to be judgment proof", *Goldberg*, *supra*, 397 U.S. at 266, all Social Security recipients will not be judgment proof, and some overpayments will be recovered by the Secretary. Hence, the cost argument, rejected by the Court in *Goldberg* is even weaker in the context of Social Security benefits.

The Secretary in his brief in *Moore*, *supra*, further stated that "[the] requirement of *Goldberg* v. *Kelly* for a pre-termination hearing before the welfare official who determines continued eligibilty was premised upon the ready proximity of the official to the recipient." Amicus in reading the *Goldberg* opinion finds no such premise therein. Indeed, the experience under *Goldberg* and *Wheeler* v. *Montgomery*, *supra*, in California indicates that this is not the case. In California's Aid to the Totally Disabled program (ATD), for example, the State ATD team, composed

of a physician and a medical social worker, which makes re-determinations concerning disability, is situated in Sacramento, *California State Dept. of Social Welfare, Public Social Services Manual*, §42.229 (hereafter refered to as P.S.S. Manual).[4]

The government's interest in the conservation of monetary or administrative resources therefore does not outweigh the interests of recipients in a prior hearing. Rather, as the Court in *Goldberg*, recognized, the government's interest is not solely limited to the saving of resources, but "important government interests are promoted by affording recipients a pretermination evidentiary hearing:"

> From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from

[4] A county medical consultant is charged with gathering and reviewing medical reports and other data before submission to the State Review team in Sacramento. P.S.S. Manual § 42.226.

> a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity". *The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.* 397 U.S. at 264-265. [Emphasis added].

These positive governmental interests are even stronger in the context of Social Security benefits. If public assistance is not "mere charity," Social Security benefits are not just "public assistance". See *Fleming* v. *Nestor*, *supra*. The government taxes workers so that they can live decently and "participate meaningfully in the life of the community" in the event of their disability. Social Security is an *earned* insurance benefit and it compensates the lost earning power of a bread winner who is now unable to work. A recent case, *Belcher* v. *Richardson*, 317 F. Supp. 1294 (S.D.W. Va. 1970), *prob. juris. noted* 401 U.S. 935 (1971) recognized this point in holding that the reduction of a recipient's Social Security disability benefits because he received a workman's compensation award for his disability was a violation of due process and equal protection. The court quoted the comments of Senator George, Chairman of the Senate Finance Committee, at the time of the passage of

the Social Security Act concerning its purpose and character:

> "It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles—that what is due as a matter of *earned right* is far better than a gratuity. . . . *Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right*, the individual is eligible to receive his benefit in dignity and self-respect." 102 Cong. Rec. 15110. (Emphasis added by Court) 317 F. Supp. at 1298.

Thus, the *ex parte* suspension by the Secretary is likely to be even more productive of "the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," *Goldberg*, *supra*, at 297, than the suspension of welfare benefits, for during their working days recipients were continually aware, through deductions in their paychecks, that they were earning their Social Security benefits.

Finally, Amicus would point once again to the 44.2 per cent reversal rate for all disability hearings. Certainly it is in the interest of the Secretary to provide a pre-termination hearing to overcome the very high degree of error in his initial determinations, for no governmental objective is served by

allowing such erroneous determinations to stand so long before reversal at hearing. See pp. 29-31, *supra*.

Thus, upon balancing the interests, a prior hearing promotes both the recipient's and the government's interests with much less administrative and fiscal cost than was the case in *Goldberg*.

### V. The Notice of Termination Provided by the Secretary is Constitutionally Inadequate.

In *Goldberg*, this Court required "that a recipient have timely and adequate notice detailing the reasons for a proposed termination . . ." *Goldberg*, *supra*, at 267-268. The notice provided by the Secretary does not meet this standard. The Secretary's form notice simply states that, "the medical evidence in your case shows that your condition has improved to the extent that you became eligible to do substantial gainful work in [month, year]." As discussed above, *supra*, at 27-31, disability determinations frequently involve complex factual determinations of medical and social data. Being informed that a decision was made on the basis of the "medical evidence in your case" only states what is obvious and informs the recipient of nothing. It is analogous with charging a man in a criminal case with "criminal activity."

A terminated recipient must be given notice specifying the medical evidence, the employment factors, and any other information relied upon by the Sec-

retary in making his determination. As the district court found in *Goldberg*, "the very summary form of notice of proposed termination makes an intelligent reply difficult." *Kelly* v. *Wyman*, *supra*, 294 F. Supp. at 904. Without adequate notice of the Secretary's claims, the right to a personal appearance is of limited utility.

## CONCLUSION

In his concurring opinion in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisite of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg*, *supra*, a prior due process hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benefits. While the Social Security disability program and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[9] Social Security was considered a worker's *earned* "contractual right" to benefits which his labor and weekly payments helped to create. In providing sustaining funds, Social Security disability benefits serve the same purpose for the disabled worker as welfare serves for its beneficiaries.

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[9] Prior to *Goldberg*, welfare benefits were often considered to be a "gratuity." See *Goldberg* v. *Kelly*, 397 U.S. 254, 261 n.8 (1971); cf. *id.* at 271 (Black, J.) (dissenting opinion). Social Security, on the other hand, is considered an "earned right." See p.p. 37-38, *supra*.

Surely, due process provides injured workers with at least as much procedural protection as recipients of public assistance.

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